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A History of Alternative Dispute Resolution: Analyzing its Role and Significance

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Abstract: *The research paper covers the historical analysis of how legal systems–both formal and informal–that were in place in various civilizations and historical periods were used to settle conflicts. This study briefly examines the development of several legal systems in antiquity. This study demonstrates that while both platforms were supported by human civilizations dispute resolution (ADR) was the most often used method globally and is still in practice today. According to research, people through the ages have chosen dispute resolution (ADR) above formal litigation as their preferred method of resolving disputes. The advantages and significance of resolving disputes through an informal judicial system have been demonstrated by research. The study shows that the ADR mechanism has been very effective in the past and with simple and cost-effective methods of dispute resolution, it can provide speedy access to justice today.*

Key Words: ADR, IJS, mediation, Negotiation, Conciliation, Arbitration

Introduction

Conflicts and philosophical differences are a fact of life. We cannot envision a life without problems since we are human beings. Human society is rife with conflicts between people who have competing interests. Conflicts between people lead to disputes. Conflicts cannot be avoided since people will always act in the same way. However, conflicts must be resolved, and they must be resolved wisely. Such a settlement of conflicts is necessary for societal harmony, peace, and amity. Consequently, there is a requirement for a sufficient and efficient dispute-resolution process, which is a necessary condition for the survival of a civilized society and a welfare state. A peaceful social environment requires the process of dispute settlement. Because society is made up of a complex network of social relationships, human conflicts are inevitable. The same is true with disputes; we cannot prevent them. Since social stability is necessary for the social order in society, disagreement disrupts the group's integration. As a result, efforts have been undertaken periodically to settle disputes between the various social groupings.

Alternative Dispute Resolution (ADR) is the as most discussed socio-legal concept. ADR modes have been successfully adopted by many communities, organizations, and countries in dispute settlement since the 1990s. However, ADR is not a new concept. This informal quasi-judicial system predates all of recorded human history. ADR has existed in a variety of forms for thousands of years. ADR strengthens the Rule of Law (ROL), institutions, and leadership. Over the past few decades, the ROL has become the standard (Liu, 2018). The ROL concept is becoming more and more popular. Additionally, it is a recurring issue in the writings of numerous academics, organizations, and institutions when discussing the operation of democracy. Additionally, the ROL has become the cornerstone of government initiatives from the World Bank (World Justice Project Rule of law, 2019), Transparency International, and other global organizations. It has significantly reduced corruption, improved governance, and supported civil liberties and political freedoms (Gowder, 2016, pp. 2-3). The ROL has a significant and legal role in the delivery of justice and equality. The administration of justice and equality before the law are closely related concepts. Any legal system in the world may function as a society because of the relationship between the two. ROL is described by the World Justice Project as an efficient system that reduces corruption, fights poverty and sickness, and protects people from injustices (WJP

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Rule of Law, 2019, p.7). Additionally, it guarantees respect for fundamental freedoms as well as justice, peace, and transparent administration. Traditionally, only the courts and the legal community were allowed to use the ROL idea. Rights, justice, and state government issues highlight how each person has a stake in the ROL and has taken on the role of the "vox populi" or voice of the people. The famous legal expert Dicey describes ROL as, "no person is punishable except for a breach of law and no person is above the law and the law treats all the citizens of a state equally; disregarding their rank, position, religion and status" (Dicey, 1979, pp. 188-193). From the top to the bottom of a governmental structure, ROL provides a transparent flow of information and the application of laws and regulations. When there isn't a ROL, state regimes wouldn't break the law or implement the regulations based only on their interests (Laruelle, 2016, p.4). On the model of established nations who strive to sustain the ROL, developing nations are working quickly to build it (Mortimer, 2010, p.1).

History has been evident to the fact that disputes were settled with the joint efforts of the elders of the societies, tribes or assemblage, with their agreed nomination who performed the role as an arbitrator, mediator, negotiator and conciliator. A customary justice mechanism was founded in the prehistoric era to settle disputes amongst the disputants and resolve them peacefully with the help of an alternative dispute resolution process. In primordial periods, due to the absence of legal system discourse the disputes were dealt with via informal procedure. Consequently, the verdicts were speedy, transparent and executed on time without any prolonged delays. In the modern era, the informal justice mechanism is recognized by the world as ADR due to its accessible approach to the provision of justice. The legal justice regime has been confronting countless trials due to burdensome monetary and time suffering for both developed and developing countries. In such circumstances, the deprived of legal rights/claims have no other preference excepting ADR mechanism to get relief in their vicinity. Thus an ADR mechanism is deemed as an addition and assists the judiciary to lessen its encumbrance and accomplished esteemed objectives of justice and rule of law.

Brief Historical Background of the Alternative Dispute Resolution (ADR)

The dispute is not a new fact, but its antiquity is as *abantiquo* as human beings a*bsquedubio* (Menkel-Meadow, 2005). In the primeval and traditional era, individuals remained subject to disagreement/ differences and bone-off contention within communities, cultures or jurisdictions, for instance, Christianity, Buddhism, Jews, Hinduism and Muslim. Subsequently, this has led to a dispute which required being resolved via an independent and impartial mechanism. The modus operandi through which the dispute was dealt with and peacefully resolved independently and impartially on the basis of *consensus ad idem* on the part of the disputant was known as an informal justice system (IJS). The prime contribution to the settlement of the dispute was the third person (s) who acted transparently in the whole proceeding. In myriad societies/ communities of Africa, Asia and the Far East the IJS was implemented for the resolution of disputes erstwhile to the evolution of the contemporary sovereign states (Fiadjoe, 2004). In conventional civilization, the modus operandi for dispute settlement was fixed as per their own standard and rules of both, families and clans. In prior eras pre-historic periods, there existed two basic kinds of individuals, the nomadic tribes and the settled ones. These two groups of societies overlooked conflicts and handled them by constructing a new proceeding structure for the settlement of the issues. The criterion lay down by the nomadic division was based on their own customary norms implemented by the headman of the community. While the settled tribes proceeding procedure for dispute resolution was established on the court pattern presided by a justice. After the advancement of consolidated government by strong rulers, including the Pharaohs in Egypt, a different formal structure of dispute resolution evolved by way of the court. The jurisdiction of the court was to hear the civil nature disputes and other petty differences between the parties with the backing of tribe heads. However, grave disputes or conflicts, such as homicide or killing, fell under the rulers' jurisdiction, or they would refer to their wazir (second in status and authority to the king) There was also an appellate forum against the decision of the tribal head. The *wazir* had conferred the jurisdiction to hear and entertain such appeals (Hassan & Malik, 2020). Hence, the dispute settlement mechanism that took place through informal ways historically in contemporary nomenclature is called Alternative Dispute Resolution (ADR) which acquired numerous procedures in diverse sections, realms and regions. The foremost mechanisms engaged as substitutions to the formal machinery of dispute settlement are mediation, conciliation, arbitration, and negotiation. ADR as a contemporary emergent legal word currently signifies a structure that has the capability to function shoulder to shoulder with the prevalent modern judicial system, however with the flexible way and lesser technicalities.

Mediation and Conciliation

"It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit" (Cohen, 1966, p.1201).

Mediation and conciliation are believed as the two utmost noticeable approaches to dispute resolution mechanisms. Mediation is a non-binding mode in which the differences between the disputant are settled by the intervention of a third person. It is a voluntary procedure based on the mutual consent of the parties in which the mediator acts impartially (Atlas, & Huber, 2000, p.5). Similarly, a dispute can be settled agreeably by way of conciliation: "a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved" (Garner, 2004, p.284). Equally, mediation and conciliation are the customary *modus operandi* of dispute settlement which is executed nearly across the globe. The San or Bushmencultures implemented the mode of conciliation for peaceable and amenable settlement to the conflicts in the past period (Barnard, 2019, p.1). Hawaiian inhabitants of Polynesians determined their domestic problems peacefully by practising their customary methods of mediation and conciliation procedure. The practice they implemented was known as "ho 'oponopono" under the patronages of the ancestral spearhead. The spearhead would initiate the matter in issue as a negotiator who had bestowed the jurisdiction to summon any of the parties, hear them, and lastly resolve the dispute through conciliation. Similarly, in the Caucasus Mountains of Georgia in the erstwhile Soviet Union; the Abkhazian inhabitants had practised mediation mode to resolve the issues inside the clan and community. In certain circumstances, even females performed the responsibility of mediator (Confucian Ethics and the Limits of Rights Theory, n.d). Also, in Nigeria, the Yoruba, people, despite the fact that they were settled tribes and lived in urban areas always preferred the customary procedure of mediation and conciliation. They used such modes through T.V program known as "*So Da Bee*" through which they decided the matter as an informal arbitrator. The leader of Yoruba known as an *Olubadan* played active participation in the informal justice system (Confucian Ethics and the Limits of Rights Theory, n.d). In South Asia, Indian societies adopted the mode of *Panchayat* The judgment of the *Panchayat* would be deemed conclusive. *Panchayat* was based on the pattern of conciliation mode; where the honourable man of the tribe would act as a conciliator. The decision of the conciliator would be binding upon the disputant parties after following the relevant procedure. If the nature of the dispute revealed legal duty the *Panchayat* would act as a trial court to decide the rights of the disputant and execute the ruling by sanction (Murali & Krishnani, 2000). The IJS remained very prominent in China. The traditional justice mechanism the Chinese adopted in their communities was the mode of mediation. Indisputably, engaging in judicial proceedings, even as a party with a legal complaint was usually considered disgraceful (Cohen, 1966, p.1206). Around 2000 years ago, in the Western Zhou Dynasty, the post of a mediator was integrated into all government organizations (Joseph, 2004).

In Malawi, the customary justice mechanism platforms account for between 80 and 90 per cent of all disputes (Sander, 1985). An estimated 60-70 per cent of disputes in Bangladesh were fixed by *Salish*, or customary indigenous community councils (Hoque, 2021). In Sierra Leone, applicable to certain communities, customary law, which is defined by the Constitution as the laws constructed on custom, has jurisdiction over around 85% of the population (Chirayath, Sage & Woolcock, 2005).

Mode of Negotiation

The concept of "negotiation" is fairly simple: it is the process of using dialogue to reach an equitable resolution to a disagreement. Negotiation is a non-binding method that aims to settle a problem amicably by encouraging communication between the parties. Therefore, negotiation is a procedure that lets people stay connected and aid in relationship management. Humans frequently engage in negotiation, which is used in a variety of social institutions. The most flexible and accessible forum of debate and discussion between the parties is the platform of negotiation. Negotiation can also be defined as a non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other's position. This model has also very deep roots in various civilizations. The Kpelle people developed an assembly to decide the domestic conflict/differences through consensus and negotiation to reach an amicable solution in the past. The Anglo-Saxons practised traditional informal modes and applied negotiation as a traditional process to resolve the differences between the parties (Sanchez, 1996).

Mode of Arbitration

The Arbitration procedure is interpreted as "A method of dispute resolution involving one or more neutral

third parties who are agreed to by the disputing and whose decision is binding" (Garner, 1999, p-100). This process of issues/disagreements is an age-old fact. During the era of Marco Polo, one method of arbitration, i.e., commercial arbitration was experienced amongst the desert groups. This was a very eminent procedure of dispute resolution amongst Phoenicians and Greek civilizations. An additional method, i.e., civil arbitration also established its roots in the above-mentioned societies. Heads and chiefs on a consistent basis resolved the bone of contention from anybody who desired to appear before, a practice very common throughout the Homeric era (1200-800 BCE) (Emerson, 1970, p.2). The *Panchayat* system in ancient India is also another example of arbitration. Although the *Panchayat* system of arbitration was not entirely abolished, the Bengal Regulation of 1772 was created as a result of the establishment of British control in India. A clause in this legislation was created that encourages parties to dispute to submit them to arbitration and treats the results of the arbitration as if they had been rendered by a judge. In order to provide more possibilities for arbitration, there were regulations issued immediately after the Bengal Regulation of 1772 in 1780 and 1781. Regulation of 1781 affirms the finality of an arbitrator's decision unless two witnesses swear under oath that the arbitrators' impartiality or lack of corruption in the matter at hand was demonstrated. The regulation of *Panchayat* arbitration differs from the original Hindu concept, which allowed for an appeal to higher tribunals. The USSR's legal structure highly encouraged various types of outside-the-court dispute settlements. Community courts and arbitral tribunals were both envisioned as alternatives to state court procedures in the Principles of Civil Procedure of the USSR and its Union Republics. To decide the bone of contention communal law courts operated as dispute resolution institutes. They were recognized outside the regular court system. In the USSR, arbitral tribunals were first recognized in 1917 and operated on an ad hoc basis. The individuals had the liberty to select state-approved judges, hearings were free and open to the public, and decisions were implemented promptly. ADR tool was also integrated into other territorial jurisdictions, for instance, the Republic of Kazakhstan after freedom from the USSR in 1991 (Shin, et al, 2004, pp. 211-212). In the sub-continent under the Delhi sultanate, and chiefly in the Mughal period; Sharia applied a decisive foundation of legitimacy for the rulers while allowing the liberty of their subjects to decide their disputes independently, through arbitrators, and through assemblages that implement laws based on customary norms (Giunchi, 2010, p. 1121-1122). The Muslim Rulers did not meddle with Hindu customs and traditions, and Hindus were always subject to their own rules when it came to private issues. Village *Panchaya*t was essential during the Medieval India dispute resolution process. In small-cause matters, *Panchayats* were at the lowest level of trial courts, and their decisions were binding. The Sultan served as his Kingdom's Supreme Court of Justice, which was the defining feature of that time period. The Sultan presided over the government in three different capacities. First, he served as a judge in the Diwan-e-Qaza, deciding conflicts between his people. The second is the bureaucracy's top official.

Conclusion

Alternative Dispute Resolution is a broad term used to describe a range of procedures designed to provide a way to resolve as an alternative to court proceedings. The historical development of ADR dates back to the history of human society. ADR has thus been a vital, vociferous, vocal and vibrant part of the human historical past. In a nutshell, it can be contended that diverse societies, kingdoms, and dynasties in diverse jurisdictions, employed various devices for the settlement of disputes. These mechanisms were closely connected to the local context, such as traditions, religion, norms, behaviour, and culture. Additionally, the dominant modes of settlement of disputes observed were mediation and conciliation, specifically in overcrowded societies like China. Arbitration and negotiation were also practised in some of the ancient societies. Different civilizations have incorporated different *modus operandi* according to their traditions and customary norms to avoid bloodshed and violence between the disputants in order to reach an acceptable solution and keep peace and security. These traditional customary dispute resolution mechanisms were practised due to quick and easy justice to the aggrieved as the local community had reposed trust and confidence in them. In primitive times, community courts were established which played a vital role in dispute settlement through the amicable procedure.

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